Section 243 of the Immigration and Nationality Act of 1952 (66 Stat. 212; 8 U.S.C. 1253) provides as follows:

"Countries to which aliens shall be deported—Acceptance by designated country; deportation upon nonacceptance by country.

(a) The deportation of any alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. . . Thereupon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—— . . . Withholding of deportation.

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

Section 405(a) of the Immigration and Nationality Act of 1952 (66 Stat. 280, 8 U.S.C. 1101 Note) provides in part:

> "Sec. 405(a). Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes (statuses), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are, unless otherwise specifically provided therein, hereby continued in force and effect."

8 Code of Federal Regulations 237.1 (1952 Ed.) provides:

> "Sec. 237.1. *Stay of deportation of excluded alien.* The immediate deportation of an excluded alien as provided in Section 237(a) of the Immigration and Nationality Act may be stayed in the discretion of district directors, upon a determination that immediate deportation is not practicable or proper, or that the alien's testimony is necessary in behalf of the United States as provided in Section 237(d) of that Act."

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 105

LENG MAY MA,

Petitioner,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco District,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

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In the Supreme Court
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OCTOBER TERM, 1957

No. 105

LENG MAY MA,
Petitioner,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco District,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The decision of the Immigration and Naturalization Service refusing to consider petitioner's application for a stay of deportation is printed in the record on pages 7 and 8. The order of the District Court (with-

out opinion) dismissing the petition for writ of habeas corpus is printed in the record (R. 8). The opinion of the Court of Appeals (R. 13-15) is reported at 241 F.2d 85.

JURISDICTION.

The judgment of the Court of Appeals was entered February 5, 1957 (R. 15). A petition for writ of certiorari was filed on April 17, 1957. Certiorari was granted on June 3, 1957 (R. 16). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED.

1. Is an excluded alien who has been physically present in the United States on parole for more than three years entitled to a hearing to prevent deportation to Communist China on an application for stay of deportation on physical persecution grounds, filed pursuant to the provisions of Section 243(h) of the Immigration and Nationality Act.

2. Does the Constitutional right of due process extend to an excluded alien on parole.

3. Does a petition for a writ of habeas corpus state a cause of action where it alleged administrative abuse of discretion and error of law.

STATUTES INVOLVED.

Section 18 of the Immigration Act of February 5, 1917 (39 Stat. 887; 45 Stat. 1551; 54 Stat. 1238; 8 U.S.C. 154), provides as follows:

> "Immediate deportation of aliens brought in in violation of law; cost of maintenance and return.
>
> All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came. It shall be unlawful for any master, purser, person in charge, agent, owner, or consignee of any such vessel to refuse to receive back on board thereof, or on board any other vessel owned or operated by the same interests, such aliens; or to fail to detain them thereon; or to refuse or fail to return them in the manner aforesaid to the foreign port from which they came; or to fail to pay the cost of their maintenance while on land; or to make any charge for the return of any such alien, or to take any security for the payment of such charge; or to take any consideration to be returned in case the alien is landed; * * *"

Section 23 of the Internal Security Act of 1950 (64 Stat. 1019) amended section 20 of the Immigration

STATEMENT OF THE CASE.

Petitioner was born in China in August of 1938. She claims to have acquired United States citizenship at the time of birth, pursuant to the provisions of Section 1993, United States Revised Statutes, as amended by the Act of May 24, 1934. (48 Stat. 797; 8 U.S.C.A. 6[1].) After issuance of a travel affidavit by the American Consulate General at Hong Kong, on March 22, 1951, the petitioner proceeded to the United States, arriving at the Port of San Francisco, California, on May 4, 1951. After extensive hearings conducted by the Immigration and Naturalization Service, it was concluded that the petitioner had failed to establish her claim. The decision of the Immigration and Naturalization Service was affirmed by the Board of Immigration Appeals on December 3, 1953.

Pursuant to a demand directed to petitioner by the San Francisco District Office of the Immigration and Naturalization Service, she surrendered for contemplated deportation to Communist China on or about January 15, 1954. Under date of January 18, 1954, there was submitted on behalf of petitioner to the District Director, Immigration and Naturalization Service, San Francisco, California, in accordance with prescribed regulations, an application for a stay of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act of 1952. On January 21, 1954, the San Francisco Office of the

---

[1]Subsequently superseded by Section 201 of the Nationality Act of 1940, 54 Stat. 1138, 8 U.S.C.A. 601, and Section 301 of the Immigration and Nationality Act of 1952, 66 Stat. 235; 8 U.S.C.A. 1401.

Immigration and Naturalization Service advised counsel for petitioner that the appellant was not eligible for the relief requested. (R. 7-8.)

At the time the petition for writ of habeas corpus was filed in the case at bar, deportation to Communist China was imminent. In the petition it was alleged that the petitioner was denied due process of law, that her deportation to Communist China was contrary to law and the expression of Congress not to deport a person to a country where such person would suffer physical persecution and that the decision of the Immigration and Naturalization Service rejecting the application for stay of deportation was an abuse of discretion.

SUMMARY OF ARGUMENT.

A. The refusal of the Immigration and Naturalization Service to give any consideration to the application filed by petitioner seeking a stay of deportation on physical persecution grounds was contrary to law; that the action of the Service was based upon an erroneous interpretation of the statute; and that the petitioner is one entitled to the relief afforded by the provisions of Section 1253(h), Title 8, U.S.C.A.

B. The petition for writ of habeas corpus alleges sufficient facts to state a cause of action. The petition charges administrative abuse of discretion and error of law. It was improper to dismiss such application without a hearing on the issues presented therein.

ARGUMENT.

THE DECISION OF THE IMMIGRATION AND NATURALIZATION SERVICE REJECTING PETITIONER'S APPLICATION FOR A STAY OF DEPORTATION ON PHYSICAL PERSECUTION GROUNDS IS CLEARLY ERRONEOUS.

It is the position of the petitioner that she is entitled as a matter of law to have her application for a stay of deportation considered by the Attorney General of the United States in conformity with the statutory provisions of Section 243(h) of the Immigration and Nationality Act. (66 Stat. 212; 8 U.S.C.A. 1253(h).) The contemplated deportation of the petitioner, or of any alien, to Communist China, a country dominated by a political organization opposed to our democratic processes, contravenes the ideals and established principles of this nation.

Petitioner filed with the appropriate office of the Immigration and Naturalization Service her verified application, in accordance with applicable regulations, praying for a stay of deportation on the ground that she would be subject to physical persecution and probable death, if deported to Communist China. (R. 5.) The Immigration and Naturalization Service, through the office of the District Director, San Francisco District, held that petitioner is not a person entitled to file an application for relief under the provisions of Section 243(h) of the Immigration and Nationality Act. Accordingly, the beneficial provisions of that part were denied this petitioner without hearing.

I.

HISTORICAL BACKGROUND.

In *United States v. Shaughnessy*, 234 F.2d 715, 718, Judge Frank said:

> "The Supreme Court has taken judicial notice of the date the yachting season ends in our northern waters. See: *The Conqueror*, 166 U.S. 110, 134. Surely the cruel habits of the Chinese Communist Government are not less notorious."

Accordingly, we call attention to the historical background of this litigation. This background should be judicially noticed or could be the subject of evidence at a trial herein.

(A) Deportations to Communist China, 1949-1953.

The People's Republic of Communist China was proclaimed in Peiping on September 21, 1949. (The World Almanac, 1953, p. 344.) Since that date and until 1953 no attempt was made to send Chinese aliens back to Communist China against their will.

It is a matter of common knowledge that China has been wholly overrun by the armed forces of the Chinese Communists; that the recognized government of the Republic of China fled to Formosa; that the principles of the Chinese Communist Government are contradictory to the principles of free and democratic government; and that the Communists have engaged in a campaign of mass murder of Chinese for vaguely defined "crimes", and that the Communist press in China, itself, puts the number of executions in excess

of a million.[2] It is equally common knowledge that the Communists are ruling China by mass murder.[3]

On January 26, 1954, before the House Appropriations Committee Walter S. Robertson, Assistant Secretary of State for Far Eastern Affairs, testified that Red Chinese slaughtered about fifteen million of their own people since 1949 which showed "just about the bloodiest pattern that the Communists have followed in any country in the world." (Department of State, Justice and Commerce, House Appropriation Hearings, 83rd Congress, 2nd Session, p. 122.)

The United Nations, through the persistent efforts of the United States, refused for a period of approximately two years to mediate the Korean situation unless all parties agreed that captured Chinese Communist soldiers would not be repatriated to Communist

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[2] "Reds Digesting China", by Marguerite Higgins, Washington Post, October 1, 1951.

[3] "They're Ruling China by Mass Murder", Saturday Evening Post, October 13, 1951, page 31; at page 167, the author points out that under the most intense suspicion, and consequent danger of extermination, are Chinese "individuals who once worked for or associated with Europeans, *particularly Americans*", and that "in a majority of cases Chinese are arrested not because they commit some overt act against the state, but because they belong to classes or categories distrusted by the communists and suspected of harboring dangerous (unorthodox) thoughts. They are sources of *potential* opposition to the regime." (Emphasis supplied.)

The United Nations General Assembly was informed November 12, 1951, that there would be no lasting peace with Red China, in Korea, or elsewhere, so long as China is dominated by "the Communist rule of mass murder"—Washington Times-Herald, November 13, 1951, page 1. Dr. T. F. Tsiang, the Chinese representative before the U. N. General Assembly, stated official announcements by Chinese Communist authorities admitted that 1,176,000 so-called counter-revolutionaries had been liquidated from October 1, 1949 to October 1, 1950, in the provinces of China, including that from which appellant originally came.

China against their wishes. (During this period, this nation alone sustained 25,000 casualties.)

Return of any individual, despite his opposition to a Communist-dominated country, would be flatly inconsistent with the principles adhered to in the Korean prisoner of war negotiations. Deportation of this petitioner to Communist tyranny would stultify our national policy of protecting those who have fled Communist oppression and make mockery of our national efforts to win over world opinion for the cause of freedom.

Indeed, on November 7, 1950, the Immigration Service officially recognized that a Chinese alien who was anti-communist would be subject to physical persecution if returned to Communist China. In a decision, known as *Matter of T—C—*, Interim Decision No. 212, decided on that date, it was held that an anti-communist Chinese alien was eligible as a displaced person under 50 App. U.S.C. 1953 (The Displaced Persons Act) because he properly feared persecution if returned to China. The Immigration Service ruled:

> "In summation, then, it will be concluded that the de facto Government of China is Communistic, and as Communistic as the Government of Russia and the countries behind the Iron Curtain."
>
> * * * *
>
> "Fear to Return: The applicant's testimony above relative to displacement based upon his fear of persecution will be utilized to establish that other cardinal eligibility requisite, namely, that the applicant is unable to return to the country of his birth, nationality, or last residence, because of

persecution on account of his race, religion or political opinions. His testimony with respect to his opposition to Communism, and the acknowledgment that China is at this time a Communist-dominated country establishes that the applicant is unable to return to China because of his fear of persecution on account of his political opinions."

(B) Deportations to Communist China, 1953-1956.

On June 18, 1953, the first attempt was made by the Department of Justice to deport aliens to Communist China. On that date it was announced in an official Press Release that:

"Attorney General Herbert Brownell, Jr. said today that 55 Chinese have been detained for deportation.

He said that those *desiring* to return to their mainland homes and not raising a claim of physical persecution at the hands of Chinese Communists will actually be deported."

Claims of physical persecution were raised by many if not all of the 55. They were not deported, but were thereafter released by the Immigration Service on bond or parole. No further action was taken until the early part of 1954 when the policy changed. For the first time claims of physical persecution were no longer honored. Aliens who had served honorably in our Army (See *Jew Sing v. Barber*, 215 F.2d 906 (C.A. 9, 1954), cert. granted 348 U.S. 910, judgment vacated as moot after petitioner's naturalization, 350 U.S. 898), aliens who have been here twenty or more years

and others who are declared anti-Communists and whose love for democracy is unquestioned, were called in for deportation to Communist China.

On March 24, 1954, Commissioner Mackey testified before the Senate Appropriations Sub-Committee as follows (p. 158, Part I, Hearings on H.R. 8067, 83rd Congress, 2nd Session):

> ". . . I should like to say right here Senator, if I may, that we have come to a solution of this problem and we are now being issued documents for the deportation of Chinese.
>
> Senator Dirksen. What is their destination?
>
> Mr. Mackey. Their destination is the interior of China by way of Hong Kong."

In the 1953 Annual Report of the Immigration and Naturalization Service at page 43 it is observed:

> "This Service has an accumulation of approximately 600 Chinese under orders of deportation because of inability to procure travel documents for deportation to China. The British Consul in New York recently advised the Service that transit visas will be granted through Hong Kong.
>
> In the first planned group of 55 deportable Chinese aliens, each has requested a stay of deportation pursuant to this Section predicated upon claims that he would be 'physically persecuted' if deported to the Chinese mainland. Therefore, it can be anticipated that practically all of the Chinese will claim 'physical persecution' when arrangements for their deportation are completed."

And, in practically every case, claims of physical persecution were denied. Considerations of long resi-

dence, American Army service, anti-communism of the alien were not considered important. The test was whether the individual was officially connected with the Nationalist Government, thus excluding practically all of the 600 under orders of deportation.

The New York Times of February 27, 1954, in an editorial entitled "Deportation Outrage," described the situation as follows:

> "These men, seamen who have overstayed leave, illegal entrants, and in one case a person involved in a felony, are admittedly deportable. That, however, is not the issue, nor ought not to be the issue, when a deportation order is tantamount to a sentence to torture and probably death.
>
> A spokesman for the Immigration Service in Washington is reported to have stated that the Service had concluded that 'claims of possible persecution' for these men were without basis. This is the height of naivete, and to say fantasy. Since when were claims of 'possible' persecution of proclaimed anti-Communists by Communists 'without basis'?
>
> * * * *
>
> We gave some good American lives to defend the righteous principle that declared anti-Communists should not be delivered into the hands of the enemy. We can afford to give some thought and effort so that others are not so delivered through either stupidity or the blind worship of a few yards of red tape."

On February 28, 1955, in a *Report on the Administration of the Immigration and the Nationality Act,* the House Judiciary Committee criticized the manner

in which stays of deportation were handled as follows (p. 69):

> "It is believed that cold statistical figures could not convey the complexity of the problem involved in 'withholding of deportation' under section 243 (h) of the Act. . . .
>
> There seems to be no set policy covering the exercise of discretionary power vested by the law in the Attorney General yet delegated by him to lower grade officers of the Immigration and Naturalization Service, who do not appear to be properly educated and trained to judge the difficult and involved elements entering into the cases before them under this section.
>
> Many officials of the Service simply do not possess the necessary intellectual background which would permit them to evaluate the imponderable factors related to the alien's social and political past, his activities, his family ties, and his other connections which may be the direct or indirect cause of persecution in the countries placed in the Soviet orbit.
>
> Similarly, few officers of the Service now vested with discretionary powers to make decisions under section 243(h) are possessed of sufficient knowledge of the past, recent, and current history of the many countries of Europe and Asia where physical persecution for political reasons is a matter of everyday practice. Not many of them know how Soviet terrorism operates behind the Iron Curtain and whom and why it singles out for destruction. In many cases brought to the attention of the task force by sources preferring to remain anonymous, apparently well justified

claims of fear of persecution in at least three countries now dominated by international communism have been flatly rejected without the presentation of anything even remotely resembling a factual rebuttal of the claims made by the deportee."

C. Deportation to Communist China—Present.

On October 31, 1956, in response to repeated criticism, the Immigration and Naturalization Service announced a new policy, restricted to expulsion and deportation cases. In *Matter of Lee Sung*, A-7921505, it was officially decreed:

"Official notice may be taken that the China mainland is under the control of a de facto Communist government. As in other Communist states, this government operates as a totalitarian dictatorship, suppressing personal liberties and imposing arbitrary restraints on the people when necessary to maintain its authority or secure its objectives. Its methods for imposing its will include persecution of individuals and groups by way of economic sanctions, corporal punishment, incarceration, and execution.

While it can be accepted as a general proposition that the Peiping government at times engages in these forms of persecution to further its authoritarian ends, no reliable information has yet been made available to this Service to indicate whether such persecution is directed indiscriminately against the populace as a whole or whether it is employed on a selective basis against particular elements. It is not known to what extent or to what degree such factors as personal political beliefs or religious views, in themselves, are

noticed or acted upon by the Communist authorities. Another unknown factor is whether prior presence in the United States has any bearing on the kind of treatment accorded by the Communist authorities to a Chinese national upon his return to the mainland, despite the fact that there is evidence indicating strong and continued efforts on the part of these same authorities to persuade their overseas nationals to reestablish themselves and their residence within Communist China. These and other specific considerations bearing on the question of physical persecution as practiced on the China mainland today are matters which await further inquiry and to which an answer may be provided through the collation of intelligence material being gathered by other agencies of the United States government.

* * * *

Pending receipt of official information which may assist in resolving the issues presented in this case, the applicant and other Chinese nationals in similar circumstances will be granted a stay of deportation until July 1, 1957. It is believed that by that time the cooperating agencies of the United States government will have succeeded in obtaining the desired information; and this case, along with the others, will then receive further consideration."

Today, therefore, temporary stays are being granted to those aliens ordered deported following expulsion proceedings and not to those aliens ordered deported following exclusion proceedings, even though they may have been paroled into the United States for a number of years.

II.

THE COMPLAINT STATES A CAUSE OF ACTION TO REVIEW NON-EXERCISE OF DISCRETION TO CONTINUE PETITIONER'S PAROLE.

(A) Parole of Excluded Aliens Under 1917 Act.

Ever since *Kaplan v. Tod*, 267 U.S. 229 (1925), excluded aliens have been paroled under our immigration laws. The 1917 Act practice is reflected in *Chong v. McGrath*, where immediate deportation was not deemed practical. This practice is set forth in the *Immigration Manual* of the Immigration and Naturalization Service, published in 1946, which contains the following at pages 5169-5170:

> "An alien who arrives at a port of entry, applies for admission, and is excluded may, when the dictates of humanity demand such action, be paroled into the United States.
>
> * * * *
>
> The parole of an inadmissible alien, under proper conditions or safeguards, may be authorized by the port authorities——
>
> (A) For an alien wife of a United States citizen, resident of the United States, who has accompanied her husband abroad and innocently failed to obtain an immigration visa or to conform to the requirement of law.
>
> (B) For registry . . . (A method of legalizing the status of an alien.)
>
> (C) For criminal prosecution in the United States. . .
>
> (D) For emergency medical or surgical treatment.

(E) *In such other exceptional cases in which to do otherwise would be inhuman or hold the Service up to ridicule.*" (Italics supplied.)

(B) Parole of Excluded Aliens Under the 1952 Act.

When the 1952 Immigration Act was originally drafted (S. 3455, 81st Congress, 1st Session, and S. 716, 82nd Congress, 1st Session, Section 212(d)(5)), it restricted paroles into the United States "solely for the purpose of receiving medical treatment." The Immigration Service protested this limitation stating in unpublished comments on section 237 of S. 716, 82nd Congress, 1st Session (on file in the Supreme Court Library):

> "The Service has on occasions encountered cases in which immediate deportation of excluded aliens is not practicable. In such cases unless the power to parole is exercised by the Attorney General, it would be necessary to keep the alien in detention for extended periods. We have in mind, for example, the cases of some 100 aliens who arrived on their own vessels. The aliens were inadmissible under the law and were therefore ordered excluded and deported. The vessels either became unseaworthy and sank, or were confiscated to satisfy legal penalties. If the bill is to be read literally, it would appear that such persons would have to be kept in detention at the ports of arrival indefinitely, until one way or another, they could raise the money to purchase return passage. Even then under the particular circumstances, the aliens would have difficulty in locating a country which would be willing to receive them. *Being refugees from a communist invasion of their own country,*

they could not return there. The Service recommends that the Attorney General be given some right to parole such aliens into the United States until deportation could be effectuated. This would be of advantage not only to the alien, but to the Government, since the latter would be relieved of the expenses for the support and maintenance of the aliens." (Italics supplied.)

Thereafter section 212(d)(5) (8 U.S.C. 1282(d)(5)) was amended to authorize parole of excluded aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest." *House Report 1365*, 82nd Congress, 2nd Session, p. 52, describes the change as follows:

> "Discretionary authority is vested in the Attorney General in paragraph 5 of section 212(d) to parole into the United States temporarily otherwise inadmissible aliens for emergent reasons or for reasons deemed strictly in the public interest. . . . The provision in the instant bill represents an acceptance of the recommendation of the Attorney General with reference to this form of discretionary relief."

(C) Petitioner's Parole May Be Continued Under the 1917 or 1952 Act.

The foregoing clearly demonstrates that the Attorney General has discretionary authority under the 1917 Act and under the 1952 Act to continue the parole of appellants to prevent their return to Communist China. From 1949 until 1953, as we have noted in Point I, the Immigration Service freely exercised this discretion to prevent deportation of excluded aliens to

Communist China. Since 1953, however, there has been a refusal to exercise discretion in the case of excluded Chinese aliens. The comments on S. 716, supra, clearly show that under the 1917 Act and under the 1952 Act such discretionary authority exists.

We submit that under this allegation of the complaint, petitioner was entitled to invoke the discretion of the Attorney General and have such discretion exercised. This non-exercise of discretion is particularly inexplicable in the light of the recent parole of Hungarian refugees. Determinations were made to bring these aliens from abroad, exclude and parole them into the United States. The petitioner is entitled to a similar exercise of discretion to escape communist terrorism.

III.

PETITIONER IS ENTITLED TO THE EXERCISE OF DISCRETION UNDER 243(h) (8 U.S.C. 1253(h)) OF THE 1952 ACT.

It is asserted, with reasonable justification, that petitioner would suffer physical persecution and probable loss of life as a result of the administrative decision of the Immigration and Naturalization Service. There can be no room for doubt that petitioner would be a likely object of the Communist Regime. The order of exclusion and deportation following petitioner's arrival does not bar her from the relief requested. Any contention that exclusion does not lead to deportation is as erroneous as it is unrealistic.

Section 237 of the Immigration and Nationality Act (8 U.S.C. 1227) like its predecessor (Section 18 of the 1917 Act, 8 U.S.C. 154) is applicable where there is to be an immediate deportation of an excluded alien. That section specifically is limited by its own language to those aliens "excluded under this Act." Hence, its provisions would not apply in the case of this petitioner.

Section 243(a) (66 Stat. 212, 8 U.S.C.A. 1253(a)), specifically provides for the deportation of any alien whether his removal be under the provisions of that Act "*or any other Act.*" (Emphasis added.)

If Section 20 of the Immigration Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950 (8 U.S.C.A. 156) is not the law under which deportation of the petitioner is sought, then Section 243 is the only section under which she may be deported.[4]

In *Quan v. Brownell*, ... F.2d ..... (decided June 27, 1957), the Court of Appeals for the District of Columbia said:

> "The Attorney General argues that there is a difference between excluding an alien and deporting him and that these aliens are to be excluded. But the very sentence of the statute which provides for excluding aliens uses the word 'deported'. The concluding clause in that sentence is 'shall be allowed to enter or shall be excluded and

[4]Compare Section 405(a) of the Immigration and Nationality Act of 1952, the so-called "savings clause" of that Act, 8 U.S.C.A. 1101, Note; *U. S. v. Menasche*, 348 U.S. 528 (1954); *Wong Kay Suey v. Brownell*, 227 F.2d 41 (1955), cert. den. 350 U.S. 969.

deported'. And the sentence which provides for the return of excluded aliens on the vessel bringing them uses the words 'deported' and 'deportation.' The basic sentence is: 'Any alien * * * who is excluded * * * shall be immediately deported * * *.' And the proviso in that sentence is 'unless the Attorney General, in an individual case, in his discretion, concludes that the immediate deportation is not practicable or proper.' The regulations reflect the same idea. For example, Section 237.1, Title 8, Code of Federal Regulations (1952) speaks of 'The immediate deportation of an excluded alien'. The distinction relevant to Section 243 is between aliens who are, legally speaking, in the United States, by entry or parole, and those who, legally speaking, are not within the borders.

That the predecessor section to Section 243(h) of the 1952 Act, which was Section 23 of the 1950 Act, applied to an alien who was excluded was settled by Ng Lin Chong v. McGrath. Section 243 (a) of the 1952 Act applies to aliens 'in the United States'. We think that section gives the Attorney General discretion in respect to the country to which he will order aliens deported, whether they are legally in the United States by entry or by parole."[5]

The Court below, relying upon its earlier decision in *Joe Sing v. Barber*, 215 F.2d 906 (C.A. 9, 1954), cert. granted 348 U.S. 910, judgment vacated as moot 350 U.S. 398, which cited *Kaplan v. Tod*, 267 U.S. 229

[5] *Ng Lin Chong v. McGrath*, 202 F.2d 316 (C.A., D.C. 1952).

(1925), held that Section 243(h) requires that an alien be "within the United States" and that an excluded alien on parole is not within the United States. We submit that these decisions are straight-jacketed by a legal fiction and fail to analyze the Immigration and Nationality Act or the *Kaplan* case properly.

Mr. Justice Holmes regarded an alien detained at or paroled from Ellis Island "as stopped at the boundary line" in interpreting residence under our naturalization statute in *Kaplan v. Tod*, 267 U.S. 229. Arrival at or parole from Ellis Island is not lawful admission to the United States, a prerequisite for naturalization. Mr. Justice Holmes was the last person in the world, however, to believe that the "boundary line" concept should be turned into dogma and "cease to provoke further analysis." (Holmes, J., dissenting, in *Hyde v. United States*, 225 U.S. 347, 384, 391 (1911) Frankfurter, J., concurring, in *Dennis v. United States*, 341 U.S. 543 (1950).) Note should be made, moreover, that in *Chin Yow v. United States*, 208 U.S. 8 (1908), Mr. Justice Holmes refused to apply the fiction of the boundary line doctrine to a subsequent case. The *Kaplan* case involved naturalization and residence for naturalization purposes which are not here involved. Peculiarly, Jew Sing was considered outside of the United States under Section 243(h) but within the United States for the purpose of naturalization.

True, section 243(h) authorizes a stay of deportation for aliens within the United States, but it should be noted that the 1952 Act itself gives evidence that

a paroled alien is to be regarded as within the United States.

Section 212(d)(5) (8 U.S.C. 1182(d)(5)) provides that excluded aliens may be paroled "into the United States temporarily." An alien paroled "into the United States" is certainly "within the United States." Section 237(a) (8 U.S.C. 1227) speaks of aliens "arriving in the United States." Section 237(b) requires carriers to remove inadmissible aliens "from the United States", and Section 235(a) (8 U.S.C. 1225) requires aliens "coming into the United States" to state the purpose of their visit under oath. Aliens "in the United States" are required to register. (Section 262, 8 U.S.C. 1302.) Aliens "within the United States" who are required to register must give notice of address changes. (Section 265, 8 U.S.C. 1305.) We have been advised officially that the Immigration Service considers paroled excluded aliens within the United States and subject to sections 262 and 265. An alien who has been excluded and deported and who is thereafter "found in the United States" without obtaining advance consent to reenter, if required, is guilty of a crime. (Section 276, 8 U.S.C. 1326.) Aliens "within the United States," except excluded aliens, may bring a declaratory judgment action under section 360(a). (8 U.S.C. 1503a.)

It is clear from the foregoing that an excluded alien is deemed to be within the United States under many of the provisions of the 1952 Act. In the absence of an express restriction, which is lacking here, the same words in different parts of a statute are assumed to

have been used in the same sense throughout the statute. *Pampanga Sugar Mills v. Trinidad*, 279 U.S. 211, 218 (1928). If excluded aliens on parole are within the United States for registration purposes, and for purposes of declaratory judgment actions as the language of section 360 indicates, then they are within the United States under section 243(h).

It was stated by this Court in *Savorgnan v. United States*, 338 U.S. 491, 505:

> "* * * the actual 'place of general abode' is the sole test for determining residence."

This principle is set forth in Section 101(a)(33) of the Immigration and Nationality Act, which provides:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." (66 Stat. 166; 8 U.S.C. 1101(a)(33).)

The Fifth Amendment provides without qualification that no person shall "be deprived of life, liberty, or property, without due process of law." It is not confined solely to the protection of citizens but as this Court has stated: "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369. This protection extends to all whose presence brings them within reach of the judicial and administrative processes of our governmental bodies. *U. S. v. Pink*, 315 U.S. 203, 228. Accordingly, it is submitted that the decisions of the Court below and the Immigration and Naturalization Service, holding

that an alien physically residing in the United States and subject to the jurisdiction thereof, is not within the United States are based upon an erroneous interpretation of the law.

THE PETITION FOR WRIT OF HABEAS CORPUS STATES A CAUSE OF ACTION.

Petitioner's application for a writ of habeas corpus was denied by the District Court without issuance of the writ, or an order to show cause, or a hearing on the merits. (R. 8.) The verified application was the only pleading filed in this cause.

It is well realized that an "application is not 'entertained' by a mere filing"; and that such an application "must meet the statutory test of alleging facts that entitled him to relief." *Brown v. Allen*, 344 U.S. 443, 461; rehearing denied 345 U.S. 946 (1953).

Section 2243 of Title 28, U.S.C. provides in part as follows:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto."

Petitioner's application set forth serious charges, alleging that the respondent failed to consider petitioner's request for a stay of deportation, a right prescribed by Congressional enactment. It further

asserted that petitioner's deportation to Communist China (which was imminent) was tantamount to a sentence of probable death; and that such decision was an abuse of discretion and contrary to law. (R. 6.) "Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, we must assume that the petitioner's allegations are true." *House v. Mayo*, 324 U.S. 42, 45, rehearing denied 324 U.S. 886 (1945).

This Court has held that "The writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights." *Darr v. Burford*, 329 U.S. 200, 203 (1950). Also compare *Hawk v. Olson*, 326 U.S. 271, 274 (1945).

This Court, in a number of decisions over a long period of time, has consistently held that habeas corpus is available in a proper case as a remedy against unlawful deportation from the United States.

United States v. Sing Tuck, 194 U.S. 161;
Bilokumsky v. Tod, 263 U.S. 149;
Heikkila v. Barber, 345 U.S. 229.

The immigration administrative decision is subject to judicial review where the proceedings have not conformed to the traditional standards of fairness required by the due process of law clause of the Fifth Amendment to the Constitution of the United States. *Japanese Immigrant Case*, 189 U.S. 86; *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103; *Wong Yang Sung v. McGrath*, 339 U.S. 33; *Kwong Hai*

Chew v. Colding, 344 U.S. 590. Or where there has been arbitrariness or abuse of discretion by the administrative agency. *Low Wah Suey v. Backus*, 225 U.S. 460; *Kwock Jan Fat v. White*, 253 U.S. 464; *Carlson v. Landon*, 342 U.S. 524; *Yaris v. Esperdy*, 202 F.2d 109, 112. The same general rule applies to determine whether or not the law has been correctly applied. *Gegiow v. Uhl*, 239 U.S. 3; *Kessler v. Strecker*, 307 U.S. 22; *Bridges v. Wixon*, 326 U.S. 135; *Fong Haw Tan v. Phelan*, 333 U.S. 6; Cf. *McGrath v. Kristensen*, 340 U.S. 162.

The questions raised in the instant proceeding are clearly the subject of inquiry by habeas corpus. Deportation cannot be effected by administrative fiat except when it complies with Congressional legislation. The only pleading in this matter alleges that the petitioner was denied a vital right guaranteed by the Constitution and laws of our nation.

The District Court concluded "that the petition for writ of habeas corpus filed herein does not state facts sufficient to warrant the writ." (R. 8.) The Court of Appeals for the District of Columbia, when considering an action filed under the Declaratory Judgment Act, seeking review of similar deportation orders, in part held:

> "* * * here deportability is conceded and the only attack is upon the Attorney General's decision that appellants should be deported to Continental China. * * *"
>
> "* * * the question is whether the complaint stated a case for preliminary injunction. It alleges

in substance that appellee, acting through his agents, arbitrarily and contrary to law has determined that claims of persecution made by Chinese aliens and filed pursuant to Section 243(h) of the Immigration and Nationality Act shall not be honored, and that in so determining he has refused to exercise his statutory discretion, which if exercised might result in the appellants being permitted to remain in the United States. These allegations, taken as true in the absence of denial of responsive pleading, obviously state a case for injunctive relief against imminent deportation to Continental China." *Lim Fong v. Brownell,* 215 F.2d 683, 684 (1954).

In *U. S. v. Shaughnessy,* 205 F.2d 238, 240 (2 Cir., 1953) the Court held that the factual question—entrant alien or assimilated resident alien could only be determined after a hearing on that issue. In *Price v. Johnston,* 334 U.S. 266, 291 (1948), this Court stated:

> "Appellate Courts cannot make factual determinations which may be decisive of vital rights where crucial facts have not been developed."

To the same effect, as to requirements of a hearing on disputed facts, are *Walker v. Johnston,* 312 U.S. 275, 285, 287 (1941); *Holiday v. Johnson,* 313 U.S. 342, 350 (1941); *Waley v. Johnston,* 315 U.S. 101 (1942); *Cochrane v. Kansas,* 315 U.S. 255, 258 (1942). This doctrine applies even though the Court might consider the allegations improbable or incapable of proof. *Holiday v. Johnston,* supra; *Waley v. Johnston,* supra. Such an application should only be denied when it is doomed to futility from its inception.

Mezei, 345 U.S. 206. That Section 243(h) of the 1952 Act is applicable only to expulsion of an alien in legal contemplation "within the United States" appears, not only from its language, but from its context in the statute. It occurs in Chapter 5 dealing with expulsion; Chapters 2 and 4 deal with exclusion. Further, the legislative history of the section shows that it was intended to apply only to expulsion. Its consideration was prompted by concern for the national security in view of the large number of outstanding unexecuted expulsion orders against undesirable aliens at large in this country. Congress, by the Internal Security Act of 1950, amended Section 20 of the Immigration Act of 1917 to facilitate the removal of these aliens, but, recognizing as a matter of grace a responsibility toward aliens once within this country's protection, added to this section the privilege now afforded by Subsection (h) of Section 243.[2] Section 18 of the Act of 1917, providing that *excluded* aliens be immediately sent back to the country whence they came, remained unaffected by the Internal Security Act:

There are strong reasons why Congress did not intend Section 243(h) to be applicable to one in petitioner's status. It is one thing to recognize a responsibility to aliens who have had residence in the United States for many years, some of whom may have lost all contact with their country of origin; it is quite another to assume a similar responsibility toward aliens who have not been within the protection of the United States and merely seek to enter from a

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[2] See H.R. 1192, 81st Cong., 1st Sess., pp. 8, 9, 17, 18; S. Rep. 2239, 81st Cong., 2d Sess., pp. 4, 10; S. Rep. 2369, 81st Cong., 2d Sess., pp. 14, 15; 96 Cong. Rec. 11724, 14170, 15632, 15726; U.S. Code Cong. Serv., 1950, 81st Cong., 2d Sess., pp. 3911-3912.

Petitioner's forced departure from the United States to a country dominated by a totalitarian form of government is diametrically opposed to the announced policy of this government. The decision of the Court below, in effect, determines that the extraordinary powers granted to this administrative agency are not subject to judicial review. Any delegated executive power is subject to conformance with the due process clause of the Fifth Amendment. *Ex parte Endo,* 323 U.S. 283, 299. Exercise of administrative discretion must be consistent "with fundamental principles of justice embraced within the conception of the due process of law" clause. *Tang Tung v. Edsell,* 223 U.S. 673, 682 (1912); *Joint Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 143, 161, 175, 176, 178, 187 (1951); *Carlson v. Landon,* 342 U.S. 524, 538 (1952). Aliens who have passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law. *Japanese Immigrant Case (Yamataya v. Fisher),* 189 U.S. 86, 100, 101 (1903); *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49, 50 (1950). The application for writ of habeas corpus clearly stated a claim for relief. We submit that petitioner, if given an opportunity, can reasonably establish that she will suffer physical persecution if deported to Communist China.

foreign country. If the claim of persecution in the country from which he came would entitle an alien to the benefit of Section 243(h), even though otherwise inadmissible, the result could well be, as a practical matter, a flood of physical entries by persons having the most tenuous claim to admission to this country. Under petitioner's view, presumably the mere presentation of an alien at the border would be sufficient for him to invoke the section. Nor can it be said to be material that the Attorney General, on petitioner's request, admitted petitioner into the United States on parole during the pendency of—and solely for the purpose of—the exclusion hearings.[3]

It is true, however, that the very issue here presented was the one involved in *Jew Sing* v. *Barber*, 215 F.2d 906 (C.A. 9), in which certiorari was granted by this Court (348 U.S. 910), but judgment was vacated for mootness on November 21, 1955 (350 U.S. 898). In that case, the claimant, although technically an excluded alien, had resided continuously in this country for some twenty-six years, and had served in this country's armed forces prior to the time he made a visit to China and attempted re-entry as a native-born American citizen. His parole had been for the pur-

[3] Petitioner's status is clearly distinguishable from that of the alien in *Ng Lin Chong* v. *McGrath*, 202 F.2d 316, in which the Court of Appeals for the District of Columbia Circuit held that, where the Attorney General chose to delay the deportation of an alien subject to immediate rejection for the purpose of prosecuting him, the alien could not be sent back under Section 18 of the 1917 Act, but must be deported under the expulsion procedures of Section 20, with the consequent right to take advantage of the physical-persecution provision. Here, petitioner's detention and parole were solely for her own interests in attempting to prove her right to enter, and her parole was terminated as soon as the exclusion proceedings were concluded.

CONCLUSIONS.

It was the purpose and intent of Section 243(h) of the Immigration and Nationality Act to prevent, for humanitarian reasons, deportation of worthy aliens who would suffer physical persecution. The Immigration and Naturalization Service refused to consider petitioner's application filed pursuant to that part. This was a denial of a vital right guaranteed by the Constitution and laws of our nation.

Acceptance of the decisions below would "inject into our system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute." *Stack v. Boyle,* 342 U.S. 1. Likewise, acceptance of the mandate of the administrative agency would condemn the petitioner herein to probable death or submission to principles to which she can not adhere. It is contradictory to our system of government to force a person so situated to accept a minor official's ultimatum without any opportunity to be heard.

For the reasons set forth above, we submit that the judgment below should be reversed.

Dated, San Francisco, California,
October 18, 1957.

Respectfully submitted,

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